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No. 342

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In the Supreme Court of the United States

OCTOBER TERM, 1968

JEROME HENRY, As Superintendent of the Indiana State Reformatory,

Petitioner,

vs.

CHARLES O. COTNER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The respondent in the above-captioned cause, Charles O. Cotner, by counsel, responds to the Petition For Writ of Certiorari which has been filed in this cause as follows:

The respondent does not dispute the "Opinions Below" nor the "Jurisdiction" portions of the petitioner's brief.

QUESTIONS PRESENTED

The first question which the petition is alleging to be presented presents an approach to this case which is very different from the approach taken by the petitioner in his Petition For Rehearing which he filed in the United States Court of Appeals for the Seventh Circuit where

it was contended at page four of the said Petition For Rehearing that the respondent has irredeemably failed to exhaust his state remedies because he failed to make use of certain remedies which had been available to him in the past. It is the respondent's position that the petitioner's first question presented should be phrased as follows:

1. Whether a convict who pleads guilty to an offense without counsel and without advisement as to the value of having counsel waives even questions effecting his fundamental rights by failing to file a motion to vacate plea within the term of court in which the plea is entered.

Respondent likewise denies that petitioner's second question presented constitutes an accurate phrasing of the issues herein and notes that the decision of the Seventh Circuit which appears at page 17 of the Petitioner's appendix contains the following ruling which appears at pages 21 and 22 of the said appendix:

> He was allowed to waive his right to counsel and to plead guilty without being informed that there was a substantial question, later revealed by Griswold, whether certain acts by married people with mutual consent can constitutionally be prohibited by the state.
>
> Because of these circumstances, Cotner's conviction must be vacated as based on a plea of guilty which was not made with a full understanding of the charge against him.
>
> The decision of the district court is reversed and the cause is remanded with instructions to grant the writ and order that Cotner be released from custody unless the state proceeds with prosecution of its charge within a reasonable time. This procedure could, if prosecution, conviction and appeal followed,

give the Indiana courts an opportunity to resolve the substantial constitutional questions which may be involved in Cotner's case.

The Seventh Circuit did not hold that the conviction of the Respondent violated his right to privacy as a matter of law (although footnote two of the Seventh Circuit's decision does contain a dictum to that effect). The holding was that the appellee had a valuable right to litigate the substantial constitutional question involved in the charges pending against him and he was not sufficiently advised prior to his plea of guilty to be held to have waived that valuable right. In view of this it is the Respondent's position that the second item in the "Questions Presented" section of the Petitioner's petition is not, in fact in issue before this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

To those statutes and amendments to the United States Constitution which the Petitioner has listed in the "Constitutional Provisions and Statutes Involved" portion of its petition the Respondent would add the following:

> Amendment 6 to the Constitution of the United States:
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

To the "statement of case" which has been submitted by the petitioner the Respondent would add certain facts to the Respondent's arraignment at which he pleaded guilty. All that the Petitioner's "statement of case" says regarding this arraignment is that "The transcript of arraignment also attached as an exhibit, reveals that Cotner entered a plea of guilty to the charge after being *fully advised of his rights.*" (Emphasis added) the Transcript of Arraignment which Petitioner states it has filed in this Court as an exhibit show five pages of dialogue between the Respondent and the trial judge covering the three occasions that the Respondent was in court up to the time of his sentencing. At the first hearing the trial judge advised the Respondent that he was charged with "the crime of sodomy" and the time and place it was alleged to have happened. The Court then asked Respondent if he had the money to hire an attorney and Respondent said that he did and that he expected to hire one after he had spoken with his father that evening. At the second hearing the trial judge asked the Respondent if he had hired an attorney and the Respondent replied that his father had been unable to obtain an attorney because "he didn't have the money." The Respondent then asked the trial court if his wife had not communicated the fact that she wished to drop the charge and the trial court replied that it would make no difference because the state and not the respondent's wife was the true plaintiff in interest. The trial court then asked the Respondent if he wanted the court to "employ" an attorney to represent him and the respondent replied: "No". The court then told the Respondent that the maximum penalty for the offense charged was two to fourteen years and read the complaining affidavit to him. The respondent then was asked if he pleaded guilty or not guilty and he replied:

"guilty, guilty." A pre-sentence investigation was ordered. On the third appearance the Respondent was sentenced to the maximum term after he was given the opportunity to express any legal reason why the court should not pronounce sentence. At no time was the Respondent advised of his right to an attorney at public expense, his right to a trial by jury, his right to subpoena witnesses, his right of confrontation and cross-examination or his right to a reasonable bail. The Respondent was in jail at all times yet there was no inquiry into the reasonableness of his bail in spite of the fact that the Respondent repeatedly complained that his bail was set too high and that his incarceration was preventing him from consulting with an attorney:

> Court: Well do you want me to employ an attorney to represent you?
>
> Respondent: Well I would like a chance to get out and talk to one. My bond is so high that I couldn't get out to talk to one.
>
> Court: Well I understand that, but do you want the Court to appoint an attorney to represent you?
>
> Respondent: No.
>
> Court: Well I want you to remember that I asked you if you wanted the Court to appoint an attorney for you.
>
> Respondent: Well I want to get out of jail. I've got five little kids at home and I want to get out and take care of them.
>
> Court: Well I understand that.

Contrary to the Petitioner's representation that Respondent was "fully advised of his rights" before he entered his plea of guilty the record shows that he was advised of nothing other than the maximum penalty and that it was implied to him that his plea of guilty would result in the termination of the matter and his release from confinement.

REASONS WHY WRIT SHOULD NOT BE GRANTED

If a writ of certiorari were granted herein the question of whether Indiana's Sodomy statute invades the constitutional right to privacy when made applicable to married couples would not truly be before the Court because it readily would be apparent that the Respondent's "arraignment" was totally illegal from a Constitutional standpoint because the Respondent was not only not advised as to any of his rights, he also was mis-advised by the trial court's statement that his wife's refusal to participate in the prosecution would have no effect upon the State of Indiana's contemplated prosecution. Like every other state, Indiana has a privileged communication statute covering the consented to and mutual activities of husband and wife (Indiana Acts 1881 (Spec. Sess.), ch. 38, sec. 275, p. 240) (Burns 2-1714) and every lawyer and judge knows that the doctrine of privileged communications prevents a successful prosecumtion for mutual marital acts committed in the privacy of the bedroom and that such a prosecution can succeed only where the defendant is mis-advised, tricked and cajoled or harassed into an improvident plea of guilty. Thus, if certiorari were granted in this cause it readily would be apparent that the question of the applicability of *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) to Indiana's Sodomy statute (Burns 10-4221) would be of no social importance because Indiana's privileged communication statute renders the sodomy statute inapplicable to mutual private marital acts in any prosecution where due process of law is afforded the accused.

The other contention presented by the Petitioner is that the Seventh Circuit has permitted the Respondent to deliberately by-pass adequate state remedies. This was not the Petitioner's contention in its Petition For Rehearing

before the Seventh Circuit. There the Petitioner urged that the Respondent had forever waived his rights in this matter by not filing a timely motion to withdraw plea of guilty:

> After entering a plea of guilty, Cotner could still have presented his claims by a motion to vacate the judgment and withdraw his plea of guilty as set forth in *Pritchard* v. *State*, ... Ind ....., 210 NE2d 372 (1965). Although this remedy was not available at the time he filed his application in federal court, it was a means by which the state courts *could have* passed on Cotner's constitutional contentions. (Emphasis added)
>
> *Petitioner's Petition For Rehearing*, pg. 4

The Respondent submits that it would be as irrational to hold that he waived all of his federal rights in this matter by not filing a motion to withdraw plea during the term of court as it would be to hold that he had waived them by entering his plea in the first place without advisement.

At page 6 of its petition the Petitioner contends that "Indiana has, particularly since *Lane* v. *Brown*, 372 U.S. 477 (1963) made a good faith effort at providing adequate means by which prisoners can present federal constitutional questions subsequent to conviction and direct appeal. This is borne out when Indiana Supreme Court Rules 2-40 and 2-40A are viewed in light of *Case* v. *Nebraska*, 381 U.S. 336 (1965)." At least two judges of the Indiana Supreme Court do not share the Indiana Attorney General's glowing opinion concerning Indiana Supreme Court Rules 2-40 and 2-40A as is shown by the following concurring opinion in a recent decision by that court:

> Hunter J. (concurring)
>
> I concur only in the result of this case for the following reasons:

This is another in a long series of cases which points up the absolute and pressing necessity for a revision of this Court's post-conviction remedy rules. This matter is now dealt with by Rules 2-40 and 2-40A of the Rules of the Supreme Court of Indiana.

It is my firm belief that, among the necessary modifications, provision must be made in these rules for an evidentiary record to be made during these post-conviction proceedings in the trial court to better enable this Court to review any allegation of abuse of discretion that may be made. Such an allegation is made in the present case but how are we to determine it properly when we have no record before us revealing what took place below? We must resort to presumptions in favor of the trial court with no other basis than some childlike faith in the inherent wisdom of that court. In the absence of a record in these post conviction proceedings, the burden of proof that is upon the petitioner in the court below becomes an almost irrebutable presumption on petition for writ of certiorari. For how can we say the court below committed an abuse of discretion if we have nothing before us from which we can determine the basis of the discretionary action complained of.

Until some change in the rule is wrought, a petition for writ of certiorari on the grounds alleged in this case will continue to be a useless exercise in futility for both the petitioner and this court.

Jackson J. concurs

Newland v. *State*, ... Ind ....., 236 NE2d 45, 46 (1968)

Other recent decisions of the Indiana Supreme Court demonstrate a continuing disposition to dispose of Constitutional questions by strained theories of implied waiver in spite of the dictates of *Fay* v. *Noia*, 372 U.S. 391 (1963), the companion case to *Lane* v. *Brown*, supra. In *Langley* v. *State*, infra, the Indiana Supreme Court

held that the appellant waived his right to raise the question of incompetence of counsel because his allegedly incompetent counsel did not raise the question in the original motion for new trial and in *Bucci* v. *State, infra,* the Indiana Supreme Court drew upon one of its decisions in 1960 in finding an implied waiver of Constitutional rights notwithstanding the intervening decision of this Court in *Fay* v. *Noia,* supra.

> The question of incompetency of trial counsel is not before this court because of the ruling of the trial court in refusing to grant permission to file a belated motion for new trial.
>
> *Langley* v. *State,* ..... Ind. ....., 232 NE 2d 611, 615 (1968)
>
> The appellants herein have not raised any Constitutional questions under Rule 2-6 of this Court and questions have not been raised under Rules 2-40 and 2-40A. This Court has held in *Green* v. *State* (1960), 241 Ind 96, 168 NE2d 345, that Constitutional questions are waived when they are not properly raised in a motion for new trial.
>
> *Bucci* v. *State,* ..... Ind ....., 237 NE2d 87 (1968)

All three of the above quoted decisions, *Bucci* v. *State,* supra, *Langley* v. *State,* supra, and *Newland* v. *State,* supra, have been or will in the near future be docketed in this Court on petition for certiorari. Respondent agrees with Petitioner's characterization of Indiana's post conviction remedies system as involving "important questions which deserve the attention and clarification of this Court." But certiorari should be granted in these other cases where the wrong has yet to be righted and not in this case where the dictates of justice already have been met. The Petitioner seeks to have this Court consign the Respondent and his fundamental rights to the jungle of

implied waivers and irrational technicalities which Indiana's post conviction remedies system has become. The "long series of cases" which Justice Hunter refers to and characterizes as "exercises in futility" in *Newland* v. *State,* supra, appear in the official reports of Indiana Decisions and they show almost no reversals of convictions or even considerations on the merits for Constitutional reasons. This lack of such reversals or even considerations evidences one of two things: 1) That criminal trial court procedure in Indiana is a model of Constitutionality where matters requiring reversal or even appellate consideration almost never occur or, 2) That the Constitution of the United States has become an almost meaningless document within the Indiana judiciary. The bizarre proceedings which took place prior to the Respondent's plea of guilty in this matter suggest that it is the latter circumstance that prevails.

For the reasons given it is respectfully submitted that certiorari should be denied.

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